Supreme Court, U.S.
FILED

No. 10-504

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IN THE

# Supreme Court of the United States

JOGINDER SINGH,

*Petitioner,*

*v.*

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

*Respondent.*

*On Petition For A Writ of Certiorari to the Ninth Circuit Court of Appeals*

## PETITION FOR A WRIT OF CERTIORARI

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October 8, 2010

## QUESTION PRESENTED FOR REVIEW

Where, as here, an asylum applicant shows that through the lack of diligence of non-attorneys who purported to represent him and misled him into concluding that they were attorneys, and through the lack of diligence of counsel who assisted him in preparing his case, a mistake of fact occurred on the record upon which the IJ relied as crucial in reaching an adverse credibility determination, did the Petitioner make a showing of ineffective assistance of counsel?

## LIST OF PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties here and in the Ninth Circuit Court of Appeals are listed.

Petitioner here and appellant below is Joginder Singh, and respondent here and below is Eric H. Holder, Jr., Attorney General of the United States.

## RULE 29.6 DISCLOSURE STATEMENT

Both Petitioner and Respondent are natural persons. There are no parent corporations or corporations that hold 10% or more of the stock of any entity in this case.

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## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported. The opinion and order of the Board of Immigration Appeals was not reported.

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered the judgment sought to be reviewed on March 31, 2010. The denial of the Petitioner's timely Motion for Panel Rehearing was entered on July 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The notifications required by Rule 29.4(b) and (c) are not required.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

5th Amendment, United States Constitution

## STATEMENT OF THE CASE

### *A. Proceedings Below*

Petitioner Joginder Singh ("Petitioner") was put into proceedings by a March 22, 2005 Notice to Appear. He requested asylum, withholding of removal under the Immigration and Nationality

Act (the "Act"), and under Article 3 of the Convention against Torture ("CAT"). This relief was denied by U.S. Immigration Judge Lawrence N. DiCostanzo ("IJ"), who after a March 15, 2006 merits hearing ordered the Petitioner removed. An appeal to the Board of Immigration Appeals ("BIA," the "Board") ensued, and by decision dated March 28, 2007 the BIA adopted and affirmed the determination of the IJ.

The Petitioner filed a Motion to Reopen dated June 26, 2007. The Board denied the Motion in an August 21, 2007 opinion. The Petitioner then filed another Motion to Reopen (the "Motion") in a filing dated September 27, 2007. Deeming this Motion a "Motion to Reconsider," the Board denied this Motion in an April 15, 2008 decision. The gravamen of the Motion was that the Petitioner was denied effective assistance of counsel because of mistakes made by his attorney that were prejudicial to him. The mistakes were manifest in the record and resulted in improper findings of fact by the IJ. Nonetheless, the Board denied all relief and affirmed the findings of the IJ. On petition for review, the United States Court of Appeals for the Ninth Circuit denied the Petitioner's petition on the grounds in a March 31, 2010 order. On a petition for rehearing, the United States Court of Appeals for the Ninth Circuit denied the motion in an order entered on July 19, 2010. This Petition followed.

*B. Raising Of Federal Question*

The question of the merits of the Petitioner's ineffective assistance of counsel argument was raised before the Ninth Circuit below, and was in fact extensively discussed in the Ninth Circuit's opinion.

## REASONS FOR GRANTING THE PETITION

The Petitioner respectfully requests that, because the Petitioner was not afforded the ingredients of due process of law arising from his ineffective assistance of counsel claim, he has stated a meritorious federal claim, and that his Petition for Certiorari should be granted.

The Board's views on due process in ineffective assistance of counsel claims were set forth in *Matter of Lozada*, 19 I.&N. Dec. 637 (BIA 1988), *aff'd sub nom. Lozada v. I.N.S.*, 857 F.2d 10 (1st Cir. 1988). There, the Board held that a petition seeking relief on the basis of ineffective assistance of counsel must be supported by an affidavit of the aggrieved party attesting to the relevant facts, and the former counsel must be informed of the allegations and given an opportunity to respond, and any response from former counsel must be included with the motion for ineffective assistance of counsel. The motion should reflect if a disciplinary complaint was filed against the former counsel and if not, why not. Finally, the asylum applicant must be prejudiced by the former counsel's performance. *Lozada*, 19 I.&N. Dec. at 639; *Ray v. Gonzales*, 439

F.3d 582, 590 (9th Cir. 2006); *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 526 (9th Cir. 2000).

The record below reflects that the Petitioner was deceived by a Mr. Heera who represented himself to be an attorney, and was not. In addition, in meetings occurring in 2003 between the Petitoner and Mr. Heera, Heera, recorded the incorrect date–August 1997—for the death of Lakhbit Singh alias Lakha, who was allegedly killed by the Punjabi police. In fact, the killing occurred in August 1999.

Thereafter, the Petitioner retained another trial attorney, Judith Lott, who failed to catch the crucial mistake of Mr. Heera. At trial, counsel for the government confronted the Petitioner with a discrepancy between that date and the date given in the Petitioner's asylum application for that event, which was August 1999. This discrepancy then became a critical factor in the adverse credibility finding by the IJ, who concluded that this discrepancy was 'fatal' to the asylum application. Finding that the Petitioner was therefore not credible, the IJ denied all relief. The Petitioner's attorney then compounded this problem by failing to provide the Petitioner with a copy of the decision of the BIA denying all relief. Thus, the Petitioner was prevented from appealing the determination of the Board directly.

The Petitioner here satisfied the elements of *Lozada*, and was denied his Fifth Amendment due process rights. The Ninth Circuit, the court

appealed from below, has held that "[i]neffective assistance of counsel amounts to a violation of due process if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005), citing *Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004), and *Lopez v. I.N.S.*, 775 F.2d 1015, 1017 (9th Cir. 1985). The elements of *Lozada* are satisfied here, contrary to the findings of the Ninth Circuit below.

Ineffective assistance of counsel claims are recognized where, as here, an alien relied on non-attorneys to who have fraudulently led an alien to believe that the person relied on was an attorney. *See, e.g., Varela v. I.N.S.*, 204 F.3d 1237, 1240 (9th Cir. 2000). Such is the case here. Indeed, the Petitioner received ineffective assistance of counsel at several points in the process of attempting to retain counsel here: he was led to believe that Mr. Heera was an attorney when he was not; his trial counsel failed to catch a critical discrepancy in the papers that led directly to an adverse credibility finding; and his attorney failed to timely provide him with a copy of the Board of Immigration Appeals' determination, thereby preventing him from appealing his case.

The Ninth Circuit's holding that the Petitioner did not suffer prejudice was incorrect. The mistake by the trial counsel led directly to the adverse credibility finding of the IJ, which resulted in the loss of his case at trial. The failure of his trial attorney to provide him with a copy of the BIA's decision

prevented him from filing and perfecting a timely appeal from the determination of the Board. These acts of ineffective assistance of counsel were crucial and prejudiced the Petitioner. They are sufficient for this Court to find an infringement of the Petitioner's due process rights. For the above arguments and reasons, the Petitioner submits that this Court should grant this Petition.

## CONCLUSION

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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